No. 86-1457

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IN THE

Supreme Court of the United States

October Term, 1986

BANKERS TRUST NEW YORK CORPORATION AND CONSOLIDATED SUBSIDIARIES,

Appellants,

v.

DEPARTMENT OF FINANCE OF THE CITY OF NEW YORK AND PAUL A. CROTTY, AS COMMISSIONER OF FINANCE,

Appellees.

On Appeal from the Supreme Court of the State of New York, Appellate Division, First Judicial Department

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BRIEF OPPOSING MOTION TO DISMISS

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BRIEF OPPOSING MOTION TO DISMISS

Appellants, Bankers Trust New York Corporation and Consolidated Subsidiaries ("Bankers Trust"), submit this brief to dispel certain misconceptions created by appellees, the Department of Finance of the City of New York and Paul A. Crotty, as Commissioner of Finance (the "City").

I. THE CITY HAS NOT SHOWN THAT THE DECISION OF THE STATE COURT WAS BASED ON AN ADEQUATE AND INDEPENDENT STATE GROUND IN THAT THE CITY HAS NOT DEMONSTRATED THAT ANY OF ITS PROCEDURAL CLAIMS HAS MERIT OR THAT THE STATE COURT BASED ITS DECISION ON ONE OF THE PROCEDURAL GROUNDS ASSERTED BY THE CITY.

The City urges this Court to dismiss the instant appeal on the basis of a variety of state procedural arguments, all of which have no merit.

The City claims incorrectly that Bankers Trust did not properly raise its claim and that the state court necessarily held for the City on that procedural ground. In so doing the City ignores the mechanics of tax proceedings in New York City. A proceeding begins when a taxpayer files a petition wi the City. N.Y.C. Admin. Code § R46-70.0 (now § 11-680). (11a)[1] Conferences are then usually held between the taxpayer and the City. If the case cannot be resolved by conference, a hearing takes place before a hearing officer (who is an employee of the Department of Finance) who receives evidence with respect to any factual issues. The City is represented by counsel (also an employee of the Department of Finance). Briefs may then be submitted to the City by both the taxpayer and the City. The Bureau of Hearings (a division of the Department of Finance) thereafter makes an administrative determination as to whether any tax is owed. If the City determines

1. Numbers followed by the letter "a" refer to pages of the appendix to the Jurisdictional Statement filed herein.

that tax is owed the taxpayer may then commence a separate judicial proceeding against the City by filing a new petition with the state Supreme Court to review the administrative determination of the City under the general state procedural provisions for the review of administrative actions. N.Y. Civ. Prac. L. & R., Art. 78 (McKinney 1987).

The triggering event for the administrative proceeding and the only statutory requirement is the filing of the first petition. Any time after that the City is free to determine whether a refund should be made. N.Y.C. Admin. Code § R46-68.0(6) (now § 11-678(6)) ("if the taxpayer files a timely petition with the director of finance . . . , he may determine that the taxpayer has made an overpayment . . ."). (10a) The timing of any evidentiary hearing is irrelevant.

A hearing is an administrative right of the taxpayer under the City law:

> No petition shall be denied in whole or in part without opportunity for a hearing on reasonable prior notice.

N.Y.C. Admin. Code § R46-70.0(1) (now § 11-680(1)). 11(a) The City seeks to convert this shield for the taxpayer into a sword for the City by contending that the evidentiary hearing created a cut-off point after which an otherwise clearly timely supplement to the petition was too late. There is no City law, regulation, rule or decision (other than the determination in this case) which provides for such a cut-off. The section of the New York Civil Practice Law and Rules, section 2221, cited by the City in support of its position, (1) applies to judicial, and not to administrative, proceedings

and (2) is not even remotely related to the proposition for which it is cited.[2]

The City also suggests that Bankers Trust improperly raised a question of fact after the close of the evidentiary hearing, stating that it can find no proof that Bankers Trust earned $26,043,451 on Federal obligations. The City sarcastically quips that "[t]he record is so lengthy that it is possible that we may have missed any reference to this amount in its more than 2,150 pages of transcript and 22 Exhibits." Mot. at 17. The City apparently also missed the fact that its own formal Decision made the Finding of Fact that "On its 1977 Consolidated Federal Corporation Tax Return [Bankers Trust] reported $26,043,451 as interest income from obligations of the United States." Finding of Fact No. 6. (16a) The Bank Tax provides that net income for Bank Tax purposes is the same as that which the taxpayer is required to report for Federal purposes (with

2. Section 2221 of the CPLR provides:

Motion affecting prior order.

(a) A motion for leave to renew or to reargue a prior motion, for leave to appeal from, or to stay, vacate or modify, an order shall be made, on notice, to the judge who signed the order, unless he is for any reason unable to hear it, except that:

1. if the order was made upon a default such motion may be made, on notice, to any judge of the court; and

2. if the order was made without notice such motion may be made, without notice, to the judge who signed it, or, on notice, to any other judge of the court.

(b) Rules of the chief administrator of the courts. The chief administrator may by rule exclude motions within a department, district or county from the operation of subdivision (a) of this rule.

A motion made to other than a proper judge under this rule shall be transferred to the proper judge.

N.Y. Civ. Prac. L. & R. § 2221 (McKinney 1987).

certain exceptions not relevant here). N.Y.C. Admin. Code § R46-37.3 (now § 11-641). (7a) The City also accepted this figure as a basis for stating in its brief before the Appellate Division that "[t]he amount in dispute is $3,599,986.23 plus interest, and represents that portion of the tax paid attributable to interest earned on United States obligations during the 1977 tax year." Resp. Br. at 1. There was no dispute with respect to the amount of interest, only with respect to its taxability.

In any event, it cannot be assumed that the state court in the separate judicial proceeding brought by Bankers Trust adopted as the basis for its decision a procedural ground stated by the City's Bureau of Hearings in the prior administrative proceeding before the City. Once Bankers Trust brought the judicial action against the City, the City assumed the posture of any other party to a litigation. The City alleged several alternative arguments: that the Bank Tax was a franchise tax, that the Bank Tax was a non-property tax in lieu thereof, that the issue of the taxation of Federal obligations was not properly raised at the administrative level, and that no refund should be granted because the City prepared its budget in reliance on the supposed validity of the tax.[3] As the Appellate Division decided in favor of the City without indicating a basis for its decision, it is impossible to determine on which alternative theory, presented by the City as a party, the court based its decision. There is no "plain statement" that the court relied on the state procedural bar and its "mere existence . . . does not deprive this Court of jurisdiction . . ." *Caldwell* v. *Mississippi*, 472 U.S. 320, 327 (1985). *See also Michigan* v. *Long*, 463 U.S. 1032, 1042 (1983).

3. The Bureau of Hearings based its decision on several other procedural grounds (17a-18a) which the City did not even mention in its arguments before the Appellate Division.

The City's procedural claim is so unfounded that it could not have been a basis of the decision of the state court and can only be seen as an artifice raised to prevent judicial review.[4] As this Court stated even before its decision in *Michigan* v. *Long*:

> Where there is a federal question, but the case may have been disposed of on some other independent ground, and it does not appear on which of the two grounds the judgment was based, then if the independent ground was not a good and valid one, sufficient of itself to sustain the judgment, this court will take jurisdiction of the case, because, when put to inference as to what points the state court decided, we ought not to assume that it proceeded on grounds clearly untenable.

Johnson v. *Risk*, 137 U.S. 300, 307 (1890) (citation omitted). "And this is also true where the non-federal ground is so certainly unfounded that it may properly be regarded as essentially arbitrary or a mere device to prevent a review of the decision upon the federal question." *Enterprise Irrigation District* v. *Farmers Mutual Canal Co.*, 243 U.S. 157, 164 (1917).

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4. As noted in the Jurisdictional Statement, in its brief before the Appellate Division the City treated its argument that Bankers Trust did not properly raise the issue of the taxation of Federal obligations almost as a throwaway, devoting less than a page of the final section of its 26 page brief to it and framing the argument as a statute of limitations issue, a position which was clearly erroneous (*see* Jurisdictional Statement at 18) and which, therefore, the City appears to have abandoned in its Motion to Dismiss. The entire discussion of this issue in the City's brief below is reprinted in the Appendix hereto. This issue was not even discussed by either party or by the court below during the oral argument.

II. THE CITY HAS MISSTATED THE STATUTORY HISTORY OF THE STATE ENABLING LEGISLATION AND THE INTENT OF THE STATE LEGISLATURE BY CLAIMING THAT THE BANK TAX IS A FRANCHISE TAX, AND THE STRAINED NATURE OF THE CITY'S ARGUMENTS LEADS TO THE CONCLUSION THAT THE BANK TAX WAS NEVER INTENDED TO BE A FRANCHISE TAX AND THAT THIS COURT SHOULD NOTE PROBABLE JURISDICTION TO HALT THE UNCONSTITUTIONAL TAXATION BY THE CITY OF INTEREST ON FEDERAL OBLIGATIONS.

The City claims that the language of the Bank Tax which states that the tax is "[f]or the privilege of doing business in the city in a corporate or organized capacity . . .", "is identical with the language in the imposition section of the model law, as enacted by the State legislature." Mot at 19. The City then cites section 3 of the Model Law, L. 1966, C. 722. Section 3, however, specifically provides that it does *not* apply to corporations subject to the Bank Tax. Model Law, L. 1966, C. 722, § 3(4). The Bank Tax is governed by section 12 of the state Model Law which provides only that the Bank Tax be levied for "the privilege of doing business in the city." (2a) The City also asserts that the language of the Model Law is "almost identical" with the state franchise tax on corporations (Mot. at 23), failing to mention that the Model Law leaves out the critical word "franchise", which is included in the state tax law, but not in the city Bank Tax.

The City suggests that the state could have imposed the state franchise tax at a higher rate and allocated the revenue to the City. Research indicates that nationally the

highest corporate tax rate based on income is the District of Columbia's tax rate of approximately 15 per cent. *All States Tax Guide* (P-H) ¶ 222 (1987). Since New York State's tax rates are competitive with those of other states it is not credible that the state would even consider more than doubling its franchise tax rate statewide and far exceeding the highest tax of other jurisdictions to permit taxation by the City of interest on Federal obligations.[5] Further, a New York State tax which applied at a higher rate within only one city would violate the equal protection clauses of both the Federal and state constitutions. *See Foss* v. *City of Rochester,* 65 N.Y.2d 247, 480 N.E.2d 717, 491 N.Y.S.2d 128 (1985) (geographic discrimination between similar taxpayers within one county is unconstitutional).

Regardless of whether the procedure posited by the City might work, it does not legitimize the present situation where there is a state franchise tax and the separate city Bank Tax. As stated by this Court in *Home Savings Bank* v. *Des Moines,* 205 U.S. 503, 519-20 (1907):

> The question here is one of power and not of economics. If the State has not the power to levy this tax, we will not inquire whether another tax which it might lawfully impose would have the same ultimate incidence.
>
> * * *
>
> "If the mere coincidence of the sum of the taxation is to be allowed to frustrate the provisions of the act of Congress, then that act becomes meaningless and the power to enforce it in any given case will not exist . . . ."

(citation omitted).

5. The combined rates would have had to have been 25.823 per cent in 1977 and 19.53 per cent currently.

CONCLUSION

For the reasons stated above and in the Jurisdictional Statement, this Court should note probable jurisdiction and halt the continued and constitutionally prohibited taxation by the City of interest on Federal obligations.

Respectfully submitted,

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APPENDIX

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Excerpt from the City's Brief in the Court Below Constituting Discussion of the Timeliness Issue.

POINT III

RESPONDENT'S DENIAL OF A REFUND SHOULD BE AFFIRMED BECAUSE THE STATUTE OF LIMITATIONS FOR A REFUND HAD EXPIRED AND A REFUND IS NOT WARRANTED.

A claim for a refund must be filed by the taxpayer within three years from the time the return was filed or two years from the time the tax was paid, whichever expires later. N.Y.C. Admin. Code Tit. R, § R46-68.0(1) (1984). Because the tax here in issue was paid in 1978, and no claim for a refund was filed until July, 1983, after the hearing was closed, the statute of limitations has expired. The Administrative Code does not provide for any tolling provisions.

Petitioners, however, assert that the only available method for requesting a refund was the one they chose. This is untrue. As long as the hearing is open, the City can increase its assessment and the taxpayer can amend its petition to raise new arguments. Once the hearing is closed, no further evidence is taken. The City is then locked into its assessment and the taxpayer is locked into the defenses or claims already asserted. The rationale here is to protect the City's budget process by providing for finality in revenue receipts.

Petitioners could have requested that the hearing be reopened. At that time, they could then have requested a refund. This was not done. Petitioners were aware that this could be done since the hearing had already been reopened once. The request for a refund is now time-barred and petitioners' request should be denied.

* * *